BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICK J. MUCKENTHALER Claimant	)	
VS.	)	Docket Nos. 1,027,411; 1,036,441; 1,043,869; and 1,043,870
PRICE CHOPPER STORE #629/HAC, INC.; FOOD 4 LESS/FALLEYS, INC.; AND DILLON CO., INC. Self-Insured Respondents	)	

ORDER

STATEMENT OF THE CASE

Respondent Price Chopper Store #629/HAC, Inc. (Price Chopper) requested review of the February 17, 2010, Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

Claimant developed injuries in his upper extremities while working as a meat cutter. Due to a series of purchases of the store where claimant worked, claimant worked for Food 4 Less/Falleys, Inc. (Food 4 Less), Price Chopper, and Dillon Co., Inc. (Dillon), in that order, during the relevant time period. Claimant initially developed ulnar nerve problems at both elbows and received medical treatment from Food 4 Less. But in 2008 claimant developed symptoms of bilateral carpal tunnel syndrome, which all three employers deny is their responsibility.

Claimant requested the February 2010 preliminary hearing to seek temporary total disability benefits and medical treatment for his bilateral carpal tunnel syndrome. In the Preliminary Hearing Order, the ALJ found claimant's date of accident was January 29, 2007, when claimant was first taken off work for right elbow symptoms. And as claimant was employed by Price Chopper on that date, the ALJ concluded Price Chopper was responsible for paying claimant temporary total disability benefits and for treating the bilateral carpal tunnel syndrome.

Price Chopper contends the ALJ erred by finding January 29, 2007, was the date of accident for claimant's repetitive trauma injuries. Price Chopper argues the appropriate date of accident under K.S.A. 2009 Supp. 44-508(d) is May 23, 2008,[1] when claimant was employed by Dillon and taken off work for left elbow surgery and steroid injections in his wrists. Price Chopper argues that is the first time claimant was taken off work for treatment that included treating the carpal tunnel syndrome. In addition, Price Chopper argues the ALJ erred by finding that it had failed to raise the defenses of timely notice and timely written claim, which Price Chopper contends claimant failed to prove.

In short, Price Chopper argues January 29, 2007, should not be the date of accident as claimant did not have carpal tunnel syndrome symptoms at that time, had not been diagnosed as then having carpal tunnel syndrome symptoms, and was not taken off work at that time for carpal tunnel syndrome symptoms. Moreover, Price Chopper maintains that in the event claimant's accident date is either January 29, 2007, or May 23, 2008, claimant failed to provide timely notice and timely written claim regarding the bilateral carpal tunnel syndrome.

Food 4 Less, who provided the medical treatment for both of claimant's elbows, argues that claimant did not work for it after 2006 and that his carpal tunnel symptoms did not begin until sometime in 2008. Accordingly, Food 4 Less maintains that claimant's carpal tunnel syndrome did not arise out of and in the course of claimant's employment with it. Moreover, Food 4 Less contends the carpal tunnel syndrome is not related to claimant's elbow injuries. Finally, Food 4 Less asserts claimant left work for Dillon in May 2008 partly due to the carpal tunnel condition and, therefore, that is the appropriate accident date under K.S.A. 2009 Supp. 44-508(d).

Dillon, however, contends it is not responsible for claimant's bilateral carpal tunnel syndrome as claimant failed to provide it with timely notice and timely written claim of that injury. Dillon argues there is no medical evidence that indicates Dillon should bear the sole responsibility for the bilateral carpal tunnel syndrome, as Dr. Brian Devilbiss opined that the carpal tunnel syndrome was not caused by a single traumatic event and Dr. Michael Poppa opined the syndrome resulted from claimant's employment with all three employers, Food 4 Less, Price Chopper, and Dillon.

Claimant attributes his bilateral carpal tunnel syndrome to the work he performed for all three employers. He maintains K.S.A. 2009 Supp. 44-508(d) affords an ALJ the opportunity to use discretion in reaching an equitable result and, therefore, the Board would do well in adopting the ALJ's January 2007 accident date. In the alternative, claimant suggests that January 9, 2009, (which is when Price Chopper and Dillon received

[1] Claimant testified he last worked on May 17, 2008, before his May 23, 2008, left elbow surgery.

written claim for claimant's bilateral carpal tunnel syndrome) should be the designated date of accident and that Dillon should be the responsible employer.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment?

2. What is the appropriate date of accident for this repetitive trauma injury?

3. Which employer is responsible for treating claimant's bilateral carpal tunnel syndrome?

4. Did claimant provide timely notice and timely written claim?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

1. In 1995, claimant underwent bilateral carpal tunnel release surgeries. Those surgeries were successful and claimant's symptoms resolved. At the time, claimant was employed by Food 4 Less as a meat cutter. Following the surgeries, claimant returned to his regular work duties, which included repetitive activities such as handling, lifting, unloading, cutting, and wrapping meat.

2. On May 24, 2005, claimant injured his right elbow at work when he struck it on a box. Claimant's right elbow symptoms did not resolve, and in early 2006 he began receiving medical treatment. In October 2006, claimant injured his left elbow at work throwing away empty boxes. The medical records introduced at the preliminary hearing indicate claimant continued working despite increasing upper extremity pain and that he was using his left arm more because of the right elbow injury. Food 4 Less eventually referred claimant to Dr. Regina M. Nouhan, who in January 2007 operated on claimant's right elbow and performed an ulnar nerve transposition.

3. In March 2007, claimant was released from medical treatment for his right elbow, and he returned to his regular work duties. Price Chopper, however, was then claimant's employer, as it had purchased the store where claimant worked. That purchase occurred in either late 2005 or early 2006.

4. In October 2007, claimant returned to Dr. Nouhan because of continued pain in his left elbow. The doctor ordered nerve conduction tests. Those tests indicated, among other things, that claimant had "[m]inimal carpal tunnel syndrome bilaterally without denervation of the abductor pollicis brevis."[2] Nonetheless, claimant went six months before seeing Dr. Nouhan again in late April 2008, when she concluded claimant's symptoms were more consistent with ulnar nerve problems rather than carpal tunnel syndrome. The doctor recommended an ulnar nerve transposition in the left elbow for his ulnar nerve symptoms and steroid injections in both wrists for the carpal tunnel syndrome. That surgery and those injections were performed on May 23, 2008.

5. In February 2008, Dillon purchased the store where claimant worked. Accordingly, Dillon was claimant's employer on May 17, 2008, which was the last day claimant worked before his May 23, 2008, surgery. Claimant testified the symptoms in his left elbow and wrists worsened through his last day of work for Dillon.

6. As it had done for the right elbow, Food 4 Less also provided claimant medical treatment for the left elbow. Food 4 Less paid claimant temporary total disability benefits through August 18, 2008, when Dr. Nouhan released claimant from medical treatment for the left elbow. Dr. Nouhan's records indicate she felt claimant's left elbow ulnar nerve compression syndrome was directly related to claimant's May 2005 injury, as the left elbow problems were from overuse during the injury and recovery period for the right upper extremity. Dr. Nouhan's medical notes do not disclose a causation opinion regarding claimant's carpal tunnel syndrome.

7. In August 2008, Dr. Nouhan recommended bilateral carpal tunnel release surgery. Then Food 4 Less referred claimant to Dr. Brian Devilbiss for a second opinion. The doctor examined claimant on November 6, 2008, and reported that claimant had numbness and tingling in the ulnar nerve distribution in his hands after the May 2005 accident but the constant numbness and tingling in the median nerve distribution in his hands did not develop until 2008. The doctor concluded the need for the revision of carpal tunnel release surgeries was not due to claimant's May 2005 accidental injury to the right elbow. The doctor wrote, in part:

> 2. Status post bilateral carpal tunnel syndrome releases in 1995 now with some return of radial sided numbness and tingling in both hands. This may certainly represent some recurrence of his carpal tunnel syndrome given his positive response to the cortisone injections given at the time of his left ulnar nerve transposition. However, I do not believe that the return of his numbness on the

[2] P.H. Trans., Resp. Ex. A at 17.

> radial side of the hand is related to his 2005 injury where he struck his right elbow as these are anatomically distant from one another.
>
> . . . In any event, I do not believe that the need to proceed with revision carpal tunnel release surgery is due to the May 24, 2005, accident in question.[3]

8. The record does not disclose the date upon which claimant or his attorney received Dr. Devilbiss' letter. But claimant's attorney represents that both Price Chopper and Dillon were promptly notified by letter that claimant had been injured while in their employ. The parties stipulated those letters were received on January 9, 2009.

9. At the request of claimant's attorney, claimant was examined by Dr. Michael J. Poppa on January 22, 2010. The doctor noted claimant was a surgical candidate for bilateral carpal tunnel release surgery. Moreover, the doctor concluded claimant injured his upper extremities due to the work he performed for all three employers. The doctor wrote in part:

> Mr. Muckenthaler's work related injury and employment at SW 22 Food 4 Less/Price Chopper/Dillon's through his last day of work was the direct and proximate cause of his resulting work related injury with residuals involving his bilateral upper extremities. This injury occurred during the course and scope of his employment. His employment did cause or substantially contribute to his present conditions, as well as the need for treatment, which he received.[4]

10. Claimant testified that nobody before Dr. Devilbiss had suggested his carpal tunnel syndrome symptoms were related to anything other than the injuries he sustained at Food 4 Less.

CONCLUSIONS OF LAW

Claimant has sustained injuries to his upper extremities from both specific incidents and repetitive trauma. Food 4 Less has provided claimant both temporary total disability benefits and medical treatment for his elbow injuries. But none of the employers has accepted responsibility for claimant's bilateral carpal tunnel syndrome. The undersigned Board Member finds that claimant sustained personal injury by accident arising out of and in the course of his employment. The primary issue at this juncture is which employer or employers are responsible for those injuries.

---

[3] P.H. Trans., Resp. Ex. B at 2.

[4] P.H. Trans., Cl. Ex. 1 at 6-7.

Determining the responsibility for repetitive trauma injuries has often been problematic. In 1994, the appellate courts attempted to formulate a bright line rule with the *Berry*[5] decision. That decision, however, did not create the litmus test contemplated, and numerous decisions followed that modified the rule. Nevertheless, in 2005 the legislature took a stab at creating a hard and fast rule setting the date of accident for repetitive trauma injuries by amending K.S.A. 44-508(d) to add the following language:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the **authorized physician takes the employee off work** due to the condition **or restricts** the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the **employee gives written notice** to the employer of the injury; or (2) the date the condition is **diagnosed as work related, provided such fact is communicated in writing to the injured worker**. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act. [Emphasis Added.]

The evidence establishes claimant's work as a meat cutter caused or contributed to his bilateral carpal tunnel syndrome. The evidence also establishes that those symptoms did not begin until 2008 and that Dillon became claimant's employer in February of that year. The evidence also establishes that claimant's carpal tunnel symptoms worsened through his last day of work on May 17, 2008. Conversely, there is no evidence at present that indicates claimant's carpal tunnel syndrome developed as a natural and probable consequence of the elbow injuries.

This claim displays the difficulties that arise when trying to dissect repetitive trauma injuries into individual body parts. Although in some cases it may be neither possible nor proper to dissect a repetitive trauma injury into separate body parts, the evidence presented thus far favors that result, as the evidence establishes when the carpal tunnel symptoms began as opposed to the symptoms from claimant's ulnar nerve injuries. Furthermore, these issues must be considered on a case-by-case basis.

The parties stipulated that on January 9, 2009, Price Chopper and Dillon received the letter from claimant's attorney in which he advised he had sustained injury while in their employment. Claimant's testimony is also uncontradicted that before he learned of Dr.

---

[5] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 229, 885 P. 2d 1261 (1994).

Devilbiss' letter and opinion he had never received anything in writing that related his bilateral carpal tunnel syndrome to his work. Indeed, claimant testified that he believed the numbness and tingling in his hands that developed in 2008 was merely related to his ongoing elbow problems. Moreover, Dr. Nouhan, who operated on claimant's elbows, was the authorized doctor of Food 4 Less, not Dillon.

As indicated above, there is no evidence at this juncture that claimant's bilateral carpal tunnel syndrome was the natural and probable result of his elbow injuries. As stated by Dr. Poppa, claimant's work as a meat cutter caused or contributed to the bilateral carpal tunnel. There is no expert medical testimony that establishes when claimant's bilateral carpal tunnel injury began. The strongest link between claimant's work and the bilateral carpal tunnel syndrome appears during claimant's employment with Dillon when his symptoms progressively worsened through his last day of work.

Applying the benchmarks of K.S.A. 2009 Supp. 44-508(d) to the bilateral carpal condition and to Dillon, the accident date established is January 9, 2009, when Dillon received the letter (or written notice) from claimant's attorney that claimant had been injured at work. The first two benchmarks of the statute (the date the authorized physician takes the employee off work or the date the authorized physician restricts the employee from the work that is causing the injury) are not applicable, as Dillon did not provide claimant with an authorized physician.

As the appropriate date of accident is January 9, 2009, the written notice Dillon received that date also satisfies the 10-day requirement for notice[6] and the 200-day requirement for written claim.[7]

In summary, the undersigned Board Member finds and concludes that Dillon is responsible for providing claimant both the medical treatment and temporary total disability compensation granted by the ALJ.

WHEREFORE, the undersigned Board Member modifies the February 17, 2010, Preliminary Hearing Order entered by ALJ Rebecca A. Sanders and finds that the appropriate accident date is January 9, 2009, and that Dillon is responsible for the medical benefits and temporary total disability compensation due claimant for his bilateral carpal tunnel injuries.

IT IS SO ORDERED.

---

[6] See K.S.A. 44-520.

[7] See K.S.A. 44-520a.

Dated this _____ day of May, 2010.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent Price Chopper Store #629/HAC, Inc.
Edward D. Heath, Jr., Attorney for Self-Insured Respondent Dillon Companies, Inc.
Bret C. Owen, Attorney for Self-Insured Respondent Food 4 Less/Falleys Inc.
Rebecca Sanders, Administrative Law Judge